STATE OF MICHIGAN

COURT OF APPEALS

BRANDT H. CRUTCHER, as Personal Representative of the Estate of ROBERT J. CRUTCHER, Deceased,

Plaintiff/Counter Defendant-Appellant,

and

GERALD W. JARDINE and UNITED MORTGAGE & REALTY,

Plaintiffs-Appellants,

v

KEVIN H. BRECK and ROBERT B. WEBSTER,

Defendants-Appellees,

and

CLARK HILL, P.L.C.,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
March 20, 2007

No. 271599
Oakland Circuit Court
LC No. 2005-067343-NO

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiff/counter defendant, Brandt H. Crutcher, as personal representative of the estate of Robert J. Crutcher, and plaintiffs, Gerald W. Jardine and United Mortgage & Realty ("UMR"), appeal as of right the trial court's order dismissing the counterclaim of defendant/counter plaintiff, Clark Hill, P.L.C. ("Clark Hill").[1] Plaintiffs also challenge the trial court's opinion and

[1] We will refer to Crutcher, UMR, and Jardine collectively as "plaintiffs."

order denying them summary disposition and granting summary disposition in favor of Clark Hill and defendants, Kevin H. Breck and Robert B. Webster.[2] We affirm.

Plaintiffs argue that the trial court erred in granting summary disposition of their legal malpractice claim regarding the January 26, 2000, clarification order in the underlying action on the ground of collateral estoppel. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Coleman v Kootsillas*, 456 Mich 615, 618; 575 NW2d 527 (1998). When deciding a motion pursuant to MCR 2.116(C)(7), this Court must consider the pleadings as well as any affidavits and documentary evidence submitted by the parties. *Id*. The applicability of collateral estoppel is also a question of law that this Court reviews de novo. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999).

"Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Barrow*, *supra*.

> Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel. [*Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (footnote and internal citations omitted).]

However, the defensive use of collateral estoppel does not require mutuality. *Id*. at 691-692.

The elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella (On Remand)*, 261 Mich App 705, 712; 683 NW2d 699 (2004). The plaintiff bears the burden of proving the elements of a legal malpractice claim. *Id*. at 715, 718; *Barrow*, *supra* at 483-484. Plaintiffs claim that defendants were negligent in approving the January 26, 2000, clarification order, or in failing to object to it.

Whether the clarification order accurately reflected the trial court's intent is a question of fact essential to the determination of whether defendants were negligent in their representation of plaintiffs, and this question was resolved in the underlying action. In the underlying action, the trial court considered the parties' motions for reconsideration. In answer to questions regarding whether the trial court intended to compare construction management fees to four and one-half percent, the trial court stated, "That was my intent." The trial court stated that it had determined that four and one-half percent was an appropriate fee, regardless of whether the fee was a property or construction management fee because "that was just a method or case where you call something something else." The January 26, 2000, clarification order provided "all management fees in excess of 4.5% of rents, whether called property management fees or construction management fees, shall be repaid by [plaintiffs]." Defendants, on plaintiffs' behalf, stipulated to the form of this order. Breck testified at his deposition that he understood the order to require all

[2] We will refer to Breck, Webster, and Clark Hill collectively as "defendants."

construction management fees to be reimbursed in their entirety and claimed that he discussed this with plaintiffs.

While the appeal in the underlying action was pending in this Court, plaintiffs moved the trial court to amend the final judgment, alleging computational errors in calculating the amount of reimbursement for construction management fees. Plaintiffs argued that the trial court had not intended a full reimbursement of the construction management fees; rather, plaintiffs asserted that the trial court had only intended to require 25 percent reimbursement, i.e., a reduction from six percent to four and one-half percent. Although the trial court admitted that it did not recall the reconsideration motions, it was unable to find that the computations had been improperly done and denied plaintiffs' motion to amend the judgment.

Even if the accuracy of the clarification order may not have been actually litigated and determined by the order denying plaintiffs' motion to amend the judgment, the issue was litigated on appeal in the underlying action. Plaintiffs argued that the trial court had intended for plaintiffs to retain a portion of the construction management fees, specifically by reducing the fees by 25 percent. This Court was not persuaded, finding that the trial court was "painfully aware" of the fees involved. This Court concluded that nothing could be clearer than the January 26, 2000, clarification order and the judgment reflected the trial court's decision. *Dolan v Crutcher*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2003 (Docket No. 231604), slip op at 3. We therefore conclude that plaintiffs had a full and fair opportunity to litigate the issue of whether the order reflected the trial court's intent and the issue was actually litigated and determined by a valid and final judgment. Accordingly, the trial court did not err in granting defendants summary disposition of this issue on collateral estoppel grounds.

Plaintiffs contend that the trial court erred in granting defendants summary disposition on the legal malpractice issue regarding trial exhibit 73, an accounting document from Twin Hills Associates ("Twin Hills"). We disagree. When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, and other evidence in the light most favorable to the party opposing the motion. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). Summary disposition is appropriately granted if, except for the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*.

The plaintiff bears the burden of proving the elements of a legal malpractice claim. *Manzo*, *supra* at 715, 718; *Barrow*, *supra* at 483-484. To prove proximate causation, plaintiffs must show that but for defendants' negligence, they would have been successful in the underlying action. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

At the trial in the underlying action, Harold Dubrowsky, the expert witness for the opposing parties, relied on exhibit 73 for the proposition that Twin Hills paid UMR $200,000 in 1986. During cross-examination, defendants elicited that the $200,000 entry was written in different ink than the rest of the document, and Dubrowsky admitted that he did not know the document's origin. In rebuttal, defendants, on plaintiffs' behalf, presented plaintiffs' accountant, Marcella Sowa-Holmes, who explained that exhibit 73 was a copy of exhibit DDDDD, which did not contain the $200,000 entry. Defendants did not offer any bank statements from Twin Hills or

UMR to rebut the payment. Exhibit 73 was the only basis for the $200,000 payment, and the trial court found that Twin Hills had paid UMR $200,000 in 1986.

Plaintiffs claim that defendants' decision not to produce bank records to rebut exhibit 73 constitutes negligence supporting their legal malpractice claim. Breck testified at his deposition that he believed he had rebutted exhibit 73 by introducing exhibit DDDDD and having Sowa-Holmes testify that there was no entry on the original record. Therefore, Breck did not believe the bank records were necessary. Webster testified at his deposition that the bank records he had did not detail individual transactions; rather, he asserted that they only showed total monthly disbursements. When an attorney acts in good faith and in the honest belief that his actions are well founded in law and in his client's best interest, he is not accountable for mere errors in judgment. *Simko v Blake*, 448 Mich 648, 658; 532 NW2d 842 (1995). Further, the decision whether to call witnesses at trial is a matter of trial strategy. *Id*. at 660. Therefore, plaintiffs have failed to show that defendants' decisions regarding the rebuttal of exhibit 73 and the bank records were more than mere errors in judgment that could rise to the level of negligence.

Plaintiffs assert that defendants were negligent in stipulating to the admission of exhibit 73 because it was not admissible, and they contend that without the stipulation, no evidence of the $200,000 payment would have been introduced. Because MRE 703, which governs the bases of expert opinion testimony, was amended in 2003, it is necessary to consider the version that was in effect at the time of the July 1999 trial. According to the 1999 court rules, MRE 703 provided as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

Case law applying this version of MRE 703 provides that an expert witness may base his opinion on evidence that is not contained in the record; under the prior version, it was not necessary for the evidence underlying an expert's opinion to be admitted or admissible. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 657; 705 NW2d 549 (2005); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175; 530 NW2d 772 (1995). It was within the trial court's discretion to permit Dubrowsky to testify about the $200,000 payment, even if exhibit 73 had not been admitted. Therefore, plaintiffs have failed to prove that the stipulation was a proximate cause in the introduction of evidence of the payment. Accordingly, the trial court did not err in granting defendants summary disposition on this issue.

Plaintiffs argue that the trial court erred in denying their motion for summary disposition of the statute of limitations issue. We disagree. We review de novo questions of statutory interpretation. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

To succeed in their legal malpractice claim, plaintiffs bear the burden of proving that defendants were negligent in their legal representation and this negligence was the proximate cause of plaintiffs' injury. *Manzo*, *supra* at 715, 718; *Barrow*, *supra* at 483-484. Therefore, plaintiffs had the burden of proving that defendants' failure to assert this statute of limitations defense was negligence and caused their injury.

Generally, the period of limitations runs from the time the claim accrues, which is "the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. However, MCL 449.43, which governs partnership accounting actions, provides, "The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary." See, also, *Reindel v Reindel*, 253 Mich 680, 682-683; 235 NW 861 (1931) (holding that the applicable statute of limitations does not begin to run in a suit for an accounting and dissolution until dissolution occurs or there has been a settlement or accounting of partnership dealings); Anno: *When statute of limitations commences to run on right of partnership accounting*, 44 ALR4th 678, § 3, p 691 (recognizing that *Reindel*, *supra*, held that the statute of limitations for a partnership accounting does not begin to run until the partnership is dissolved).

Robert Crutcher and Jardine were partners with Richard E. Dolan and Ronald Fecteau in various real estate partnerships. In the underlying action, Dolan, Fecteau, and the various partnerships sought an accounting and money damages for breaches of the various partnership agreements. However, Dolan and Fecteau never alleged that the various partnerships had been dissolved, and defendants presented certificates of existence for many of the various partnerships.

Plaintiffs have failed to identify what fees or damages were incurred outside the applicable statute of limitations. Further, although they assert that the applicable statute of limitations is six years, they do not provide any support for this assertion. Therefore, plaintiffs have failed to meet their burden of proving that defendants were negligent in not moving for summary disposition in the underlying action on the ground of statute of limitations. They have not demonstrated that their injury resulted from defendants' inaction, and summary disposition was properly denied.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter